TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 349

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN WIGGER, ALIAS "MOOSE JOHN."

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, FOURTH DIVISION.

FILED JANUARY 31, 1914.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 890.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN WIGGER, ALIAS "MOOSE JOHN."

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, FOURTH DIVISION.

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1 In the Supreme Court of the United States of America.

UNITED STATES OF AMERICA, plaintiff in error, *vs.* JOHN WIGGER, ALIAS "MOOSE JOHN," defendant in error.	No. 612. Criminal.

Names of attorneys of record: James J. Crossley, United States attorney, for plaintiff in error, Fairbanks, Alaska; Thos. A. Marquam, attorney for defendant in error.

2 In the District Court for the Territory of Alaska, Fourth Judicial Division, at Fairbanks.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JOHN WIGGER, ALIAS "MOOSE JOHN," DEFENDANT.	No. 612. Criminal.

Præcipe for record to be sent to Supreme Court of the United States.

TO ANGUS MCBRIDE, Esq.,
Clerk of the above-named court:

You will please make certificate and transmit to the Attorney General of the United States a transcript of the record in the above-entitled cause consisting of the following papers:

1. Indictment and indorsements thereon.
2. Demurrer to indictment.
3. Judgment and decision sustaining demurrer.
4. Petition for writ of error.
5. Assignment of errors.
6. Certificate of judge.
7. Order allowing writ of error.
8. Writ of error.
9. Citation.

The return day named in the citation herein is February 24th, 1914, and it is desirable that the transcript be in the hands of the Attorney General a sufficient time prior to that date to enable it to be examined by him and filed in the Supreme Court on or prior to the said 24th day of February, 1914.

Dated at Fairbanks, Alaska, this 26th day of December, A. D. 1913.

Respectfully,

JAMES J. CROSSLEY,
United States Attorney.

Due and legal services of the foregoing præcipe for record to be sent to the Supreme Court of the United States, by receipt of copy

thereof, is hereby admitted and acknowledged this 26th day of December, A. D. 1913.

T. A. MARQUAM,
Attorney for Defendant.

(Endorsed:) No. 612. Criminal. In the District Court of the United States for the Territory of Alaska. The United States of America, plaintiff, vs. John Wigger, alias "Moose John," defendant. Præcipe for record to be sent to Supreme Court of the United States. Filed in the District Court, Territory of Alaska, 4th Div. Dec. 26, 1913. Angus McBride, clerk.

3 In the District Court for the Territory of Alaska, Fourth Judicial Division, at Fairbanks.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN WIGGER, ALIAS "MOOSE JOHN," DEFENDANT. } No. 612. Criminal.

Indictment.

COUNT I.

John Wigger, alias "Moose John," is accused by the grand jury for the Territory of Alaska, Fourth Judicial Division, convened at Fairbanks, by this indictment of the crime of assault committed as follows:

The said John Wigger, alias "Moose John," on the thirteenth day of July, A. D. one thousand nine hundred and thirteen, near Fairbanks, in the Fairbanks precinct, Fourth Judicial Division, District and Territory of Alaska and within the jurisdiction of this court, not being armed with a dangerous weapon, did, then and there, unlawfully assault one Silas Calderhead by then and there striking and placing his hands upon the person and private parts of said Silas Calderhead and otherwise ill-treating him, the said Silas Calderhead, said Silas Calderhead being then and there a male child of the age of ten years, and he, the said John Wigger, alias "Moose John," being then and there a male person over the age of twenty-one years; all contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT II.

And John Wigger, alias "Moose John," is further accused by the grand jury for the Territory of Alaska, Fourth Judicial Division, convened at Fairbanks, by this indictment, of the crime of indecent exposure, committed as follows:

4 The said John Wigger, alias "Moose John," on the seventh day of July, A. D. one thousand nine hundred and thirteen, near Fairbanks, in the Fairbanks precinct, Fourth Judicial Division, District and Territory of Alaska, and within the jurisdiction of this

court, did, then and there, unlawfully, wilfully, and lewdly expose his person and private parts in a place where there were present other persons to be offended and annoyed thereby, to wit: Silas Calderhead, a male child of the age of ten years; Wallace Calderhead, a male child of the age of twelve years; Norman Russell, a male child of the age of eleven years; and George Taggart, a male child of the age of twelve years; and he, the said John Wigger, being then and there a male person over the age of twenty-one years; all contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT III.

And John Wigger, alias "Moose John," is further accused by the grand jury for the Territory of Alaska, Fourth Judicial Division, convened at Fairbanks, by this indictment of the crime of indecent exhibition committed as follows:

The said John Wigger, alias "Moose John," on the thirteenth day of July, A. D. one thousand nine hundred and thirteen, near Fairbanks, in the Fairbanks precinct, Fourth Judicial Division, District and Territory of Alaska, and within the jurisdiction of this court, did, then and there, unlawfully, wilfully, and lewdly make an exhibition of himself to the view of other persons, to wit: Silas Calderhead, a male child of the age of ten years; Wallace Calderhead, of the age of twelve years; Norman Russell, a male child of the age of eleven years; and George Taggart, a male child of the age of twelve years, by then and there exhibiting his naked body to the view of said Silas Calderhead, Wallace Calderhead, Norman Russell and George Taggart, such exhibition being offensive to decency and adapted to excite vicious and lewd thoughts and acts, he, the said John Wigger, alias "Moose John," being then and there a male person over twenty-one years of age; all contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Fairbanks, Fourth Judicial Division, District and Territory of Alaska, this twentieth day of November, A. D. one thousand nine hundred and thirteen.

JAMES J. CROSSLEY,
United States District Attorney.

The following are the names of the witnesses examined before the grand jury on the finding of the foregoing indictment: R. W. Calderhead, R. C. Wood, R. M. Brown, Wallace Calderhead, Silas Calderhead, and Norman Russell.

(Endorsed:) No. 612. Criminal. District Court, 4th Judicial Division, Territory of Alaska, at Fairbanks. The United States of America, plaintiff, vs. John Wigger, alias "Moose John," defendant. Indictment. Count I. For the crime of assault. Count II. For the crime of indecent exposure. Count III. For the crime of indecent

exhibition. A true bill. Charles Pyne, foreman, grand jury. Presented to the court by the foreman of the grand jury in open court in the presence of the grand jury, and filed in the District Court, Territory of Alaska, Fourth Division, Fairbanks, Alaska, Nov. 21, 1913. Angus McBride, clerk, by P. R. Wagner, deputy.

6 In the District Court, Territory of Alaska, Fourth Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN WIGGER, DEFENDANT. } No. 612. Criminal.

Demurrer.

Comes now the defendant and demurs to the indictment herein for the reasons:

(I) That more than one crime is charged in the indictment;

(II) That said indictment contains more than one count, to wit, three counts, all of which are improperly joined.

Defendant further demurs to count one in said indictment for the reasons:

(I) That the same does not substantially conform to the requirements of chapter seven, Title XV, of the Compiled Laws of the Territory of Alaska, which said title constitutes the code of criminal procedure for the said Territory, in that said count does not contain a statement of facts constituting the offense sought to be charged in ordinary and concise language, and in such a manner so as to enable a person of common understanding to know what is intended;

(II) That the facts therein stated do not constitute the crimes sought to be charged in said count, or any other crime.

Defendant further demurs to count two of said indictment for the reasons:

(I) That the same do not substantially conform to the requirements of chapter seven, Title XV, of the Compiled Laws of the Territory of Alaska, which title constitutes the code of criminal
7 procedure for said Territory, in that said count does not contain a statement of the facts constituting the offense sought to be charged in ordinary and concise language, and in such manner so as to enable a person of common understanding to know what is intended:

(II) That the facts set forth in said count do not constitute a crime.

Defendant further demurs to count three of said indictment for the reasons:

(I) That said count does not substantially conform to the requirements of chapter seven, Title XV, of the Compiled Laws of the Territory of Alaska, which said title constitutes the code of criminal procedure in said Territory, in that said count does not contain a statement of the facts constituting the alleged offense sought to be

charged in ordinary and concise language and in such a manner so as to enable a person of common understanding to know what is intended.

(II) That the facts set forth in said count do not constitute a crime.

T. A. MARQUAM,
Attorney for Defendant.

Service of the foregoing demurrer admitted, and a true copy thereof received this 24 day of November, 1913.

JAMES J. CROSSLEY,
Attorney for Plaintiff.

(Endorsed:) No. 612. Cr. In the District Court for the Territory of Alaska, Fourth Division. United States of America, plaintiff, vs. John Wigger, defendant. Demurrer. Filed in the District Court, Territory of Alaska, 4th Div., Nov. 24, 1913. Angus McBride, clerk, by P. R. Wagner, deputy.

8 In the District Court for the Territory of Alaska, Fourth Division.

General October, 1913, term. Wednesday, November 26, 1913. Twenty-ninth court day.

UNITED STATES OF AMERICA, PLAINTIFF,
vs. No. 612. Cr.
JOHN WIGGER, DEFENDANT.

Order sustaining demurrer.

The demurrer to the indictment herein having been heretofore argued and submitted to the court for decision, and the court being now fully advised in the premises,

It is ordered that said demurrer be, and the same is hereby, sustained, and that the matter be resubmitted to the grand jury, to which ruling of the court the United States attorney excepted, and which exception was allowed.

Entered in Court Journal No. 12, page 778.

F. E. FULLER,
District Judge.

9 Copy.

In the District Court for the Territory of Alaska, Fourth Division.

UNITED STATES OF AMERICA
vs.
JOHN WIGGER, ALIAS MOOSE JOHN, DEFENDANT. } No. 612. Criminal.

Memorandum.

The grand jury returned an indictment against the defendant in this case containing three separate counts charging the defendant

with the commission of three different violations of the criminal laws in force in Alaska. The defendant demurred to this indictment upon the grounds that more than one crime is charged therein, and that the indictment contains several counts improperly joined. He assigned, further, as grounds of demurrer to each count that the same does not contain a statement of facts constituting the offense charged in concise language and in such manner to enable a person of common understanding to know what is intended, and that the facts therein do not constitute the crime sought to be charged therein or any other crime.

It appears that each count contains a statement of an offense in the language usually employed to charge the crime intended, and, so far as the second grounds of demurrer are concerned, the contention of the defendant is not sustained.

The question presented by the first assignment of the demurrer is whether or not the pleadings in a criminal case instituted by the United States in the Territory of Alaska are regulated by the provisions of the act of Congress of March 3, 1899, or by the act of the Territorial legislature of April 26, 1913.

The former act provides "that the indictment must charge
10 but one crime and in one form only, except that when the crime may be committed by use of different means, the indictment may allege the means in the alternative." (Sec. 2152, Compiled Laws of Alaska. And by the same act it is provided that the defendant may demur to the indictment when it appears upon the face thereof "that more than one crime is charged in the indictment." (Sec. 2198, Compiled Laws of Alaska.)

The act of the legislature is as follows:

"An act to amend section 43 of Title II of the act of Congress of March 3, 1899, entitled 'An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District.'

"Be it enacted by the Legislature of the Territory of Alaska:

"That section 43 of Title II of the act of Congress, approved March 3, 1899, entitled 'An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District,' be and is hereby amended to read as follows:

"'When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such case the court may order them to be consolidated.'"

On August 24, 1912, Congress passed an act entitled "An act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes." And it is from the provisions of this act that the territorial legislature derives its

power and authority to enact laws, and by its provisions the
11 limitations upon the power and authority of the legislature are to be determined.

Section 9 of the act of Congress contains the following extensive grant of authority:

"The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

followed by certain limitations, none of which, however, apply to the Territorial act in question.

Section 3 of this act provides:

"That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature,"

followed by a proviso restricting the authority of the legislature to alter, amend, modify or repeal certain specified laws, none of which relate to the Territorial act in question.

From a comparison of this act with the provisions of prior acts of Congress establishing a Territorial government in various Territories it appears that, in general, the provisions are much the same. The two provisions above quoted are found in practically all of such acts; but the clause "that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by act of Congress," seems to have no similar counterpart in any prior law, and it is upon the effect to be given this clause that in my opinion depends the validity of the Territorial act above quoted. The reason, probably, that such a provision has not occurred in other Territorial organic acts is that in many, if
12 not all, of them provision was made for legislative, executive, and judicial departments for the Territory at the same time.

Although no judicial construction of any similar clause has been found, reference to some of the Territorial organic acts and judicial determinations of the power and authority conferred by them may be of assistance in this case.

The general provisions of the acts of Congress in relation to Territories established prior to the adoption of the Revised Statutes are contained in Chapter I of Title XXII, sections 1839–95.

Section 1864 provides for a supreme court consisting of a chief justice and two associate justices; and the following section makes provisions for the division into three judicial districts of each Territory, and for the holding of a district court in each division by

one of the justices of the supreme court "at such time and place as may be prescribed by law;"

And section 1866 provides that the jurisdiction, both appellate and original, of these courts "shall be limited by law."

And it has been held that the "law" referred to include a law passed by the Territorial legislature. Ferris v. Higley, 20 Wall., 375.

Section 1869 provides that "writs of error, bills of exception, and appeals shall be allowed in all cases from the final decision of the district court to the supreme court of all the Territories, respectively," under such regulations as they prescribe by "law," and the "law" referred to in this connection is a law passed or to be passed by the Territorial legislature.

The act is not inconsistent with the Constitution nor the general laws of the United States, in fact, is identical with section 1024 of the Revised Statutes.

13 The character of the courts established by Congress in the Territories is well characterized in an early opinion by Chief Justice Marshal in determining certain provisions of the organic act of the Territory of Florida:

"These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the Territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution; the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the General and of a State Government."

(Am. Ins. Co. vs. Canter, 26 U. S., 544.)

The laws of Congress relating to procedure in courts of the United States have been held not applicable to Territorial courts. And in a case wherein was involved the right of a legislature of a Territory to pass an act providing for the same procedure in actions at law and suits in equity, the Supreme Court has said:

"The acts of Congress respecting proceedings in the United States courts are concerned with, and confined to, those courts, considered as parts of the Federal system, and as invested with the judicial power of the United States expressly conferred by the Constituton, and to be exercised in correlation with the presence and jurisdiction of the several State courts and governments. They are not intended as exertions of that plenary municipal authority which Congress has

over the District of Columbia and the Territories of the
14 United States. They do not contain a word to indicate such intent. The fact that they require the circuit and district courts to follow the practice of the respective State courts in cases at law, and that they supply no other rule in such cases, shows that they can not apply to the Territorial courts. As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction.

"Whenever Congress has proceeded to organize a government for any of the Territories, it has merely instituted a general system of courts therefor, and has committed to the Territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject also, however, to the right of Congress to revise, alter, and revoke at its discretion. The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature; and the jurisdiction of the Territorial courts is collectively coextensive with and correspondent to that of the State courts—a very different jurisdiction from that exercised by the circuit and district courts of the United States. In fine, the Territorial, like the State courts, are invested with plenary municipal jurisdiction.

"It is true that the district courts of the Territories are, by the organic act, invested with the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; and a portion of each term is directed to be appropriated to the trial of causes arising under the said Constitution and laws. Whether, when acting in this capacity, the said courts are to be governed by any of the regulations affecting the circuit and district courts of the United States, is not now the quesion. A large class of cases within the jurisdiction of the latter courts would not, under this clause, come in the Territorial courts; namely, those in which the jurisdiction depends on the citizenship of the parties. Cases arising under the Constitution and laws of the United States would be composed mostly of revenue, admiralty, patent, and bankruptcy cases, prosecutions for crimes against the United States, and prosecutions and suits for infractions of the laws relating to civil rights under the fourteenth and fifteenth amendments. To avoid question and controversy as to the modes of proceeding in such cases, where not already settled by law, perhaps additional legislation would be desirable.

"From a review of the entire past legislation of Congress on the subject under consideration, our conclusion is, that the practice,

pleadings, and forms and modes of proceeding of the Territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express and implied conditions in the organic act
15 itself, were intended to be left to the legislative action of the Territorial assemblies, and to the regulations which might be adopted by the courts themselves. Of course, in case of any difficulties arising out of this state of things, Congress has it in its power at any time to establish such regulations on this, as well as on any other subject of legislation as it shall deem expedient and proper."

(Hornbuckle vs. Toombs, 85 U. S., 655.)

From the decision last quoted it is apparent that in the Territories generally the Territorial legislatures have had the power to prescribe rules of procedure for the courts established by Congress, at least in all actions arising under the Territorial laws and concerning matters upon which the Territory could legislate. There seems to have been a distinction, however, made between cases of the United States; that is, cases arising under the general laws of the United States and cases under the Territorial laws; that is, cases which in the various States would be tried by the State courts, as distinguished from the cases in which the United States courts would have jurisdiction.

Referring again to the provisions of the Revised Statutes it appears that certain days of certain terms were set apart for United States business; that the expenses of the court, while employed on such matters, were paid by the United States; and that such business was attended to by the attorney for the United States, while the expenses of the Territorial courts at other times were paid by the Territories, and the business of the Territories was conducted by the Territorial attorney or attorney general; and that the United States marshal executed the process of these courts while exer-
16 cising jurisdiction as courts of the United States, whereas at other times such process was executed by a sheriff or other like officer of the Territory.

"SECTION 1874. The judges of the supreme court of each Territory are authorized to hold court within their respective districts in the counties wherein, by the laws of the Territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes, except those in which the United States is a party; but the expenses of holding such courts shall be paid by the Territory or by the counties in which the courts are held, and the United States shall in no case be chargeable therewith.

"SECTION 1875. There shall be appointed in each Territory a person learned in the law to act as attorney for the United States. He shall continue in office for four years and until his successor is appointed and qualified, unless sooner removed by the President.

"SECTION 1876. There shall be appointed a marshal for each Territory. He shall execute all process issuing from the Territorial courts when exercising their jurisdiction as circuit and district

courts of the United States. He shall have the power and perform the duties and be subject to the regulations and penalties imposed by law on the marshals for the several judicial districts of the United States. He shall hold his office for four years and until his successor is appointed and qualified, unless sooner removed by the President."

(Rev. Statutes, Ch. I, Title XXIII.)

Reference to the organic act of the Territory of Oklahoma (26 Stat. L., 81) organizing the latest of the Territories of the mainland of the United States shows that a similar procedure was followed in that instance.

Section 13 of this act provides:

"That there shall be appointed for said Territory a person learned in the law, who shall act as attorney for the United States and shall continue in office for four years and until his successor is appointed and qualified, unless sooner removed by the President. Said attorney shall receive a salary at the rate of two hundred and fifty dollars annually. There shall be appointed a marshal for said Territory, who shall hold his office for four years and until his successor is appointed and qualified, unless sooner removed by the President,
and who shall execute all process issueing from the said courts
17 when exercising their jurisdiction as circuit and district courts
of the United States; he shall have the power and perform the duties and be subject to the same regulations and penalties imposed by law on the marshal of the United States and be entitled to a salary at the rate of two hundred dollars a year. There shall be allowed to the attorney, marshal, clerks of the supreme and district courts the same fees as are prescribed for similar services by such persons in chapter sixteen, title Judiciary, of the Revised Statutes of the United States."

Section II of this act provides that certain laws of the State of Nebraska be extended to and put in force in Oklahoma until after the adjournment of the first session of the legislative assembly of said Territory; and, included in these laws so put in force, were parts of the Nebraska Code of Civil Procedure. The intent of this act was to authorize the Territorial Legislature of Oklahoma to make such changes in, and regulations for, the criminal and civil procedure of
the Territorial courts as it might deem advisable.

18 Provision was made by section 1894–5 of the Revised Statutes for payment by the United States of the expenses incident to the subsistence and imprisonment of offenders against the laws of the United States in penitentiaries erected by the United States in the Territories, and for receiving persons convicted of violations of Territorial laws at the cost of the Territories.

In a case wherein it was held that the attorney general of the Territory of Utah, and not the United States district attorney, was the proper person to conduct a prosecution under the laws of the Territory, the Supreme Court of the United States makes the following statement concerning the conditions existing in the Territories:

"This recital shows that the business of these courts, when acting as circuit and district courts of the United States, is to be kept distinct from their business as ordinary courts of the Territory; and gives countenance to the idea upon which the Territorial legislature seems to have acted in appointing separate executive officers for attending the courts when sitting as Territorial courts. By an act of that legislature, passed March 3d, 1852, it is, among other things, provided that an attorney general shall be elected by the legislative assembly to attend to all legal business on the part of the Territory before the courts where the Territory is a party, and to prosecute individuals accused of crimes in the judicial district in which he shall keep his office, in cases arising under the laws of the Territory; and that for the other districts, district attorneys shall be elected in like manner with like duties. This law, it is understood, has always been acted upon until the recent decision of the supreme court of Utah, denying its validity. Similar laws have been passed and acted upon in other Territories, organized under similar organic acts. The attorney appointed by the President for the Territory has been accustomed to attend to the business of the General Government, the same as is done by United States district attorneys in the several States; and the attorney general and district attorneys of the Territory have attended to the business of the latter and prosecuted crimes committed against the Territorial laws."

(Snow vs. U. S., 85 U. S., 320.)

19 The acts providing civil governments for Hawaii, Porto Rico, and the Philippine Islands likewise disclose the intention that the business of the Territorial courts in matters arising under the Territorial laws should be kept separate from the business of the United States under the general laws of the United States.

In Hawaii and Porto Rico separate United States District Courts were established, and in them the United States laws as to procedure seem to govern; but authority is expressly given to the legislatures of these Territories to regulate the procedure in the other courts.

Section 81 of the organic act of Hawaii (31 Stat. L., 157) is as follows:

"That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

(Carter v. Gear, 197 U. S., 349.)

Section 8 of the act providing a civil government for Porto Rico (31 Stat. L., 79) contains the following:

"SEC. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and *affect*, except as altered, amended, or modified hereinafter or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statu-

tory laws of the United States not locally inapplicable, or the provisions thereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

Section 31 of the same act gives the Porto Rico legislature power "to alter, amend, modify, and repeal any and all laws and ordinances of any character now in force in Porto Rico or any municipality or district thereof not inconsistent with the provisions hereof."

And section 33, providing in what courts the judicial power shall be vested, has this provision:

"The jurisdiction of said courts, and the form of procedure in them, and the various officials and attaches thereof, respectively, shall be the same as defined and prescribed in and by said laws and ordinances and said general orders numbered 118 and 195, until otherwise provided by law: *Provided, however*, That the chief justice and associate justices of the supreme court and the marshal thereof shall be appointed by the President, by and with the advice and consent of the Senate, and the judges of the district courts shall be appointed by the governor, by and with the advice and consent of the executive council, and all other officials and attaches of all the other courts shall be chosen as may be directed by the legislative assembly, which shall have authority to legislate from time to time as it may see fit with respect to said courts, and any others they may deem it advisable to establish, their organization, the number of judges and officials and attaches for each, their jurisdiction, their procedure, and all other matters affecting them."

Sections 36 and 37 provide for payment of salaries and expenses from out of the revenue of Porto Rico.

Section 9 of an act "Temporarily to provide for the administration of the affairs of civil government in the Philippine Islands and for other purposes" (32 Stat. L., 695), is as follows:

"That the supreme court and the courts of first instance of the Philippine Islands shall pass and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said Government to change the practice and method of procedure. The municipal courts of said islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law; and the chief justice and associate justices of the supreme court shall hereafter be appointed by the President, by and with the advice and consent of the Senate, and shall receive the compensation heretofore prescribed by the commission until otherwise provided by Congress. The judges of the court of first instance shall be appointed by the civil governor, by and with the advice and consent of the Philippine Commission: *Provided*, That the admiralty jurisdiction of the supreme court and courts of first instance shall not be changed except by act of Congress."

In contrast with the procedure in the different Territories under the laws above referred to, the condition under the criminal laws of Alaska show several differences. In the other Territories the offences charged in the indictment in this case would be offences against the Territorial laws and not against the laws of the United States. The prosecution would be conducted by a Territorial attorney general or district attorney; the expenses of the court while trying cases of such nature would be borne by the Territory; if the defendant were convicted, and a sentence of imprisonment imposed, the ex-
21 penses of such imprisonment would be borne by the Territory, while if a fine were imposed, it would be collected for the benefit of the Territory or of a county therein.

In Alaska, all crimes are prosecuted in the name of the United States, by the attorney of the United States, and fees and expenses of witnesses and jurors are paid by the United States from appropriations made by act of Congress; and in case of the conviction of an offender, any moneys collected are for the benefit of the United States, and all expenses of imprisonment are borne by the United States in Federal jails within the Territory or in penitentiaries of the United States without the Territory.

In view of these different conditions, it may well be doubted whether Congress intended to confer upon the Legislature of the Territory of Alaska such control of proceedings in criminal cases as had been invested in the legislatures of other Territories wherein prosecutions were conducted by Territorial officers and the expenses of criminal proceedings were borne by the Territories themselves. There are no acts of Congress which are distinguished by their titles as establishing executive and judicial departments in Alaska; but the provisions concerning these departments are found in various acts.

The act of May 17, 1884 (23 Stat. L., 24), entitled "An act providing a civil government for Alaska" is the first of the laws of Congress providing a court within Alaska. Prior to that time violations of the laws which had been extended to this Territory were prosecuted in any district court of the United States in California, or Oregon, or in the district courts of Washington. (15 Stat. L., 241.) Section 3 of this act provided:

"That there shall be, and hereby is, established a district court of said district, with a civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of
22 district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law."

The general laws of the State of Oregon were declared to be the law of said District so far as the same were applicable and not in conflict with the laws of the United States; and the said district court was also given jurisdiction, generally, in equity, common law, and criminal matters.

The courts thus established continued until the passage of the act of June 6, 1900, entitled "An act making further provision for

civil government of Alaska, and for other purposes," although, by the act of March 3, 1899 (30 Stat. L., 1253), entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district," it was evidently contemplated that the district court should consist of several divisions.

The offenses complained of in the indictment in this case are defined and made punishable under the provisions of Title I of this latter act.

Title II contains these provisions:

SECTION 1. "That proceedings for the punishment and prevention of the crimes defined in Title I of this act shall be conducted in the manner herein provided."

SECTION 5. "That in criminal actions in the District of Alaska the United States is the plaintiff and the person prosecuted is the defendant."

Section 4 of the act of June 6, 1900, provides as follows: "There is hereby established a district court for the District, which shall be a court of general jurisdiction in civil, criminal, equity, and admiralty causes."

And it is further provided that the court shall consist of three divisions, and that the jurisdiction of each division of the court shall extend over the District of Alaska.

23 And section 54 of the act provides:

"That hereafter the forms of pleadings in courts of record and the rules by which the sufficiency of the pleadings is to be determined shall be those prescribed by this code."

By an act approved March 3, 1909 (35 Stat. L., 839), part of section 4 of the act of June 6, 1900, was amended to read as follows:

"That there is hereby established a district court for the District of Alaska, with the jurisdiction of circuit and district courts of the United States, and with a general jurisdiction in civil, criminal, equity, and admiralty cases;"

and provides for four divisions of the court, with the full complement of officers, instead of the three divisions provided by the former act of June 6, 1900.

While it is not apparent that the expenses of administering the criminal laws could be in any way increased by this act of the Territorial legislature, but, on the contrary, would probably be diminished, matters of procedure and the expenses of administration are usually closely connected. Under the present practice and procedure all such expenses are paid by the United States, as above stated, and under appropriation acts passed by Congress.

Section 15 of the organic act of Alaska has also this provision:

"and no expenditure to be paid out of money appropriated by Congress shall be made by the governor or by the legislature for objects not authorized by the acts of Congress making the appropriations nor beyond the sums thus appropriated for such objects;"

and the following provision of the Revised Statutes also seems applicable:

"SEC. 1886. All accounts for disbursements, in the Territories of the United States, of money appropriated by Congress for the support of government therein shall be settled and adjusted at the Treasury Department; and no act, resolution, or order of the legislature of any Territory, directing the expenditure of the sum, shall be deemed a sufficient authority for such disbursement, but
24 sufficient vouchers and proof for the same shall be required by the accounting officers of the Treasury. No payment shall be made or allowed unless the Secretary of the Treasury has estimated therefor and the object been approved by Congress. No session of the legislature of a Territory shall be held until the appropriation for its expenses has been made.

In prosecutions under laws passed by the Legislature of Alaska it has been held by a comptroller:

"In bringing these prosecutions, the Territory assumes the same liability for fees and expenses thereto as the United States assumes in prosecuting violations of the Federal laws."

"Prisoners sentenced under Territorial laws are Territorial prisoners, and the expenses of their support is not payable by the United States."

(Letter from comptroller to Attorney General, October 4, 1913.)

The question to be decided in this case seems to be narrowed down to this: Whether or not the provisions of the statute above referred to in regard to the procedure in the district court are part of the laws of the United States heretofore passed establishing a judicial department in Alaska.

It should be noted that the provision of the organic act is:

"That all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by act of Congress."

It would seem that the laws concerning procedure in the courts in actions prosecuted in the name of the United States, and by its officers, are an essential and integral part of the laws establishing the executive and judicial departments, and, if such is the case, these laws can be amended or repealed only by act of Congress.

The recital of the different conditions existing in the Territories wherein the Territorial legislatures are considered authorized to establish codes of procedure seems to indicate the reasons
25 which may have influenced Congress in not extending similar powers to the Legislature of Alaska.

It was contended upon the argument in this case that, inasmuch as the organic act required that all laws passed by the Territorial legislature should be submitted to Congress, and if disapproved by Congress, to be null and of no effect; and inasmuch as there has been no disapproval of the Territorial act above mentioned by Congress, that impliedly, at least, Congress has approved such act.

"It is worthy of mention that the law under consideration was reported to Congress and has not been annulled."

(Tiaco v. Forbes, 228 U. S., 549.)

If the organic act prohibited the legislature from passing such an act, it would seem that further action by Congress declaring it to be invalid would be unnecessary, and that this would be true even if the act had been in force for a much longer time.

The organic act of Utah passed in 1850 (9 Stat. L., 453), provided in section 6:

"All the laws passed by the legislative assembly and governor shall be submitted to Congress of the United States, and, if disapproved, shall be null and of no effect."

and section 9 thus established the judicial power:

"The judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace."

"The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law."

In 1855 the Territorial legislature passed an act giving the several probate courts in their respective counties power to exercise original jurisdiction, both civil and criminal, and as well in chancery as at common law. This act was never disapproved by Congress, and the probate courts of the Territory seem to have exercised the jurisdiction attempted to be given them by the legislature.

26 In 1874 the Supreme Court of the United States held that such jurisdiction was so inconsistent with that usually exercised by probate courts that it could not be considered that Congress ever intended to authorize the legislature to give probate courts of the Territory such jurisdiction; and, notwithstanding the length of time that had elapsed after the passage of the act by the legislature, and the fact that the same had never been disapproved by Congress, held such act to be invalid.

"It is supposed that a sufficient answer to this course of reasoning is found in the declaration of the ninth section of the organic act already cited, that the jurisdiction of the several courts therein provided for 'shall be as limited by law.' The argument is that this refers to laws to be thereafter made by the Territorial legislature, and that as the power of that body extended to all rightful subjects of legislation, it extended to this of totally changing the jurisdiction of these courts. We are not prepared to say that, in deciding what law is meant in this phrase 'as limited by law,' we are wholly to exclude laws made by the legislature of the Territory. There may be cases when that legislature, conferring new rights, or new remedies or establishing anomolous rules of proceedings within their legislative power, may direct in what court they shall be laid. Nor are we called on to deny that the functions and powers of the probate courts may be more specifically defined by Territorial statutes within the limit of the general idea of the nature of probate courts, or that certain duties not strictly of that character may be imposed on them by that legislation.

"But we hold that the acts of the legislature are not the only law to which we must look for the powers of any of these Territorial

courts. The general history of our jurisprudence and the organic act itself are also to be considered, and any act of the Territorial legislature inconsistent with the latter must be held void. We are of opinion that the one which we have been considering is inconsistent with the general scope and spirit of that act in defining the courts of the Territory, and in the distribution of juridi'al power amongst them, inconsistent with the nature and purpose of a probate court as authorized by that act, and inconsistent with the clause which confers upon the supreme court and district courts general jurisdiction in chancery as well as at common law. The fact that the judges of these latter courts are appointed by the Federal power, paid by that power—that other officers of these courts are appointed and paid in like manner—strongly repels the idea that Congress, in conferring on these courts all the powers of courts of general jurisdiction,
27 both civil and criminal, intended to leave to the Territorial legislature the power to practically evade or obstruct the exercise of those powers by conferring precisely the same jurisdiction on courts created and appointed by the Territory.

"The act of the Territorial legislature conferring general jurisdiction in chancery and at law on the probate courts is, therefore, void." (Ferris v. Higby, 20 Wall., 383.)

Ordinarily, an inferior court will not assume the responsibility of holding invalid any legislative enactment, unless clearly satisfied of such invalidity and, unless such enactment is clearly invalid, will leave the question to be determined by the court of last resort.

The question raised by demurrer in this case was presented without time for counsel thoroughly to investigate or argue the case, and, in order seasonably to conduct the criminal business before the court, it was necessary to determine the question presented within a short time after argument. While not entirely satisfied with the views expressed, I am of the opinion that the demurrer should now be sustained. The matter is resubmitted to the grand jury, and separate indictments can be returned at once, charging the defendant with the various offenses charged in the various counts of the indictment, and, if it seem advisable, the cases may be consolidated for trial and practically the same end attained by such procedure as by allowing the indictment containing three separate counts to stand.

If the ruling is erroneous it is not apparent in what way either the United States or the defendant will be prejudiced, while if the view expressed is correct, and the case should proceed to trial upon the present indictment, and thereafter, in case the defendant should be convicted, the judgment should be reversed by the appellate court, both the Government and the defendant would have been put to a considerable and unnecessary expense.

F. E. FULLER, *District Judge.*

28 (Endorsed:) No. 612. Criminal. District Court, 4 Division District of Alaska. United States vs. John Wigger, alias Moose John. Memorandum. Filed in the District Court, Territory

of Alaska. 4th Div. Dec. 2, 1913. Angus McBride, clerk, by P. R. Wagner, deputy.

29 In the District Court for the Territory of Alaska, Fourth Judicial Division, at Fairbanks.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN WIGGER, ALIAS "MOOSE JOHN," DEFENDANT. } No. 612. Criminal.

Certificate of judge.

UNITED STATES OF AMERICA,
Territory of Alaska, Fourth Judicial Division, ss:

I, F. E. Fuller, judge of the District Court for the District and Territory of Alaska, Fourth Judicial Division, do hereby certify that I presided in said court on the 26th day of November, 1913, and rendered the decision sustaining the demurrer of the defendant to the indictment in the above-entitled cause, and said decision sustaining said demurrer was based wholly upon the invalidity of the statute upon which said indictment containing three different counts was found and to which particular reference is made in the petition for a writ of error herein and also in the assignment of errors filed in connection with said petition.

Dated at Fairbanks, Alaska, this 26th day of December, A. D. 1913.

F. E. FULLER,
District Judge.

Due and legal service of the foregoing certificate of judge, by receipt of copy thereof, is hereby admitted and acknowledged this 26th day of December, A. D. 1913.

T. A. MARQUAM,
Attorney for Defendant.

(Endorsed:) No. 612. Criminal. In the District Court of the United States for the Territory of Alaska. The United States of America, plaintiff, vs. John Wigger, alias "Moose John," defendant. Certificate of judge. Filed in the District Court, Territory of Alaska, 4th Div., Dec. 26, 1913. Angus McBride, clerk.

30 In the District Court for the Territory of Alaska, Fourth Judicial Division, at Fairbanks.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN WIGGER, ALIAS "MOOSE JOHN," DEFENDANT. } No. 612. Criminal.

Petition for writ of error.

Now comes the United States of America, the above-named plaintiff, by James J. Crossley, United States district attorney for the

Fourth Judicial division of the District and Territory of Alaska, and says:

That on the 26th day of November, A. D. 1913, the District Court for the Fourth Judicial Division of the District and Territory of Alaska rendered its certain decision and judgment in favor of the above-named defendant and against the above-named plaintiff sustaining the demurrer of the said defendant to the indictment returned and filed in said court in the above-entitled cause and adjudging that said indictment be dismissed, which said indictment was theretofore founded, returned, and filed in said court and cause upon and pursuant to the provisions of chapter 39, Session Laws of Alaska, 1913, entitled "An act to amend section 43 of Title II of the act of Congress of March 3, 1899, entitled 'An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district,'" approved April 26, 1913, and effective July 26, 1913, and that such decision and judgment were based wholly upon the invalidity of said statute; and that in said decision and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of said plain-
31 tiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States of America and directed to the said District Court of the Fourth Judicial Division, District and Territory of Alaska, for a correction of the errors so complained of and that a transcript of the record, proceedings, and papers in this cause duly authenticated may be duly sent to the Supreme Court of the United States of America.

Dated at Fairbanks, Alaska, this 24 day of December, A. D. 1913.

JAMES J. CROSSLEY,
United States District Attorney, Fourth Judicial Division, District and Territory of Alaska.

Due and legal service of the foregoing petition for writ of error, by receipt of copy thereof, is hereby admitted and acknowledged this 26th day of December, A. D. 1913.

T. A. MARQUAM,
Attorney for Defendant.

(Endorsed:) No. 612. Criminal. In the District Court of the United States for the Territory of Alaska. The United States of America, plaintiff, vs. John Wigger, alias "Moose John," defendant. Petition for writ of error. Filed in the District Court, Territory of Alaska, 4th Div., Dec. 26, 1913. Agnus McBride, clerk.

4th Div. Dist. of Alaska. Received Dec. 24, 1913. Office of U. S. marshal, Fairbanks, Alaska. Marshal's docket No. 188. Writ docketed Dec. 24, 1913. Return docketed ———, 19—.

32 In the District Court for the Territory of Alaska, Fourth Judicial Division, at Fairbanks.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN WIGGER, ALIAS "MOOSE JOHN," DEFENDANT. } No. 612. Criminal.

Order allowing writ of error.

On this 26th day of December, A. D. 1913, comes the above-named plaintiff by James J. Crossley, United States district attorney for the Fourth Judicial Division of the District and Territory of Alaska, and files herein and presents to the court his petition praying for the allowance of a writ of error and also an assignment of errors intended to be urged by him; and praying also that a transcript of the record and proceedings and papers upon which the decision and judgment herein were rendered duly authenticated may be sent to the Supreme Court of the United States of America, and that such other and further proceedings may be had that are proper in the premises; and it appearing from said petition and assignment of errors that the decision and judgment complained of and sought to be reversed by said Supreme Court of the United States of America is based wholly upon the invalidity of the statute upon which the indictment in this cause containing three different counts was found, a more particular reference to which is contained in the said petition and assignment of errors.

Now, therefore, the court does allow said writ of error and orders the same to issue.

F. E. FULLER, *District Judge.*

Entered in court journal No. 12, page 811.

Due and legal service of the foregoing order allowing writ of error, by receipt of copy thereof, is hereby admitted and acknowledged this 26th day of December, A. D. 1913.

33

T. A. MARQUAM,
Attorney for Defendant.

(Endorsed:) No. 612. Criminal. In the District Court of the United States for the Territory of Alaska. The United States of America, plaintiff, vs. John Wigger, alias "Moose John," defendant. Order allowing writ of error. Filed in the District Court, Territory of Alaska, 4th Div., Dec. 26, 1913. Angus McBride, clerk.

34 In the District Court for the Territory of Alaska, Fourth Judicial Division, at Fairbanks.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN WIGGER, ALIAS "MOOSE JOHN," DEFENDANT. } No. 612. Criminal.

Assignment of error.

The plaintiff in this action in connection with its petition for writ of error herein makes the following assignment of errors, which it alleges to have occurred and to exist in the trial and proceedings had in said cause:

I.

The court erred in sustaining the demurrer of the defendant to the indictment herein.

II.

The court erred by its said judgment and decision in holding, upon sustaining the demurrer of said defendant to the indictment herein, that the statute upon and pursuant to which said indictment was founded, returned and filed in said court and cause being chapter 39, Session Laws of Alaska, 1913, entitled "An act to amend section 43 of Title II of the act of Congress of March 3, 1899, entitled 'An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District,'" approved April 26, 1913, and effective July 26, 1913, was and is invalid and of no force and effect in the said District Court for the District and Territory of Alaska.

III.

The court erred in holding by its said judgment and decision sustaining the demurrer of the defendant to the indict-
35 ment herein that the said indictment was and is void and contrary to the provisions of section 3, 9, and 15 of the acts of Congress approved August 24, 1912, providing for Territorial legislature for Alaska, and was and is contrary to the provisions of section 2152, Compiled Laws of Alaska, on the ground and for the reason that the said indictment contains three separate counts charging three criminal acts and transactions connected together and of the same class of crimes and offences which might otherwise be properly joined together in said indictment.

IV.

The court erred in its judgment and decision sustaining the demurrer of the defendant in this action on the ground that chapter 39, Session Laws of Alaska, 1913, as aforesaid, is invalid and in contravention of section 3 of the acts of Congress approved August 24, 1912, providing for a Territorial legislature for Alaska.

Wherefore the United States of America, the said plaintiff, move that the said decision and judgment sustaining the said demurrer herein be reversed.

Dated at Fairbanks, Alaska, this 24 day of December, A. D. 1913.

JAMES J. CROSSLEY,
United States District Attorney, Fourth Judicial Division, District and Territory of Alaska.

Due and legal service of the foregoing assignment of error, by receipt of copy thereof, is hereby admitted and acknowledged this 26th day of December, A. D. 1913.

T. A. MARQUAM,
Attorney for Defendant.

(Endorsed:) No. 612. Criminal. In the District Court of the United States for the Territory of Alaska. The United States of America, plaintiff, vs. John Wigger, alias "Moose John," defendant. Assignment of error. Filed in the District Court, Territory of Alaska, 4th Div., Dec. 26, 1913. Angus McBride, clerk.

4th Div., Dist. of Alaska. Received Dec. 24, 1913. Office of U. S. marshal, Fairbanks, Alaska. Marshal's docket No. 188. Writ docketed Dec. 24, 1913. Return docketed ———, 19—.

36 In the Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
JOHN WIGGER, ALIAS "MOOSE JOHN," DEFENDANT IN ERROR.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To John Wigger, alias "Moose John," greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America at the city of Washington on the 24th day of February, 1914, pursuant to a writ of error filed in the clerk's office in the District Court for the Fourth Judicial Division of the District and Territory of Alaska, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decision rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice done to the parties in that behalf.

Given under my hand at Fairbanks, in the Fourth Judicial Division of the District and Territory of Alaska, this 26th day of December, A. 1913.

F. E. FULLER,
District Judge.

37 Due and legal service of the foregoing citation, by receipt of copy thereof, is hereby admitted and acknowledged this 26 day of December, A. D. 1913.

T. A. MARQUAM,
Attorney for Defendant.

(Indorsed:) Original. In the Supreme Court of the United States. The United States of America, plaintiff in error, vs. John Wigger, alias "Moose John," defendant in error. Citation. Filed in the District Court, Territory of Alaska, 4th Div., Dec. 26, 1913. Angus McBride, clerk.

38 In the Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
JOHN WIGGER, ALIAS "MOOSE JOHN," DEFENDANT IN ERROR.

Writ of error.

The President of the United States of America, to the judge of the District Court of the Fourth Judicial Division of the District and Territory of Alaska, greeting:

Because in the record and proceedings and also in the rendition of the judgment and decision which is in said District Court before you, between the United States of America, plaintiff, and John Wigger, alias "Moose John," defendant, a manifest error has happened to the great damage of said United States of America, as by its complaint appears; we being willing that the error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if a decision or judgment be given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you may have the same in the city of Washington on the 24th day of February, 1914, in the said Supreme Court of the United States to be then and there held that, the record and proceedings aforesaid be inspected, the said Supreme Court of the United States may cause further to be done to correct that error, what of right and according to the laws and custom of the United States of America should be done.

39 Witness the honorable Edward D. White, Chief Justice of the United States, and the seal of the District Court for the Fourth Judicial Division of the District and Territory of Alaska, this 26 day of December, A. D. 1913, and of the Independence of the United States of America the one hundred and thirty-eighth year.

ANGUS MCBRIDE,
Clerk of the District Court of the Fourth Judicial Division of the District and Territory of Alaska,
By P. R. WAGNER,
Deputy Clerk.

Allowed Dec. 26, 1913.

F. E. FULLER, *District Judge.*

40 Due and legal service of the foregoing writ of error, by receipt of copy thereof, is hereby admitted and acknowledged this 26th day of December, A. D. 1913.

J. A. MARQUAM,
Attorney for Defendant.

(Indorsed:) Original. In the Supreme Court of the United States. The United States of America, plaintiff in error, vs. John Wigger, alias "Moose John," defendant in error. Writ of error. Filed in the District Court, Territory of Alaska, 4th Div., Dec. 26, 1913. Angus McBride, clerk; by ———, deputy. James J. Crossley, Esq., U. S. attorney.

41 In the District Court for the Territory of Alaska, Fourth Judicial Division, at Fairbanks.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JOHN WIGGER, ALIAS "MOOSE JOHN," DEFENDANT. } No. 612. Criminal.

Clerk's certificate.

UNITED STATES OF AMERICA, *Territory of Alaska, Fourth Division, ss:*

I, Angus McBride, clerk of the District Court of the Territory of Alaska, Fourth Division, hereby certify that the foregoing and hereto annexed forty typewritten pages, numbered from 1 to 40, inclusive, constitute a full, true and correct copy of the record, and the whole thereof, as per the præcipe of the plaintiff in error on file herein, and made a part hereof, wherein the United States of America is plaintiff, and John Wigger, alias "Moose John," is defendant, cause number 612, Criminal, as the same appear of record and on file in my office. I do further certify that the said record is by virtue of the writ of error and the citation issued herein, and made a part of this record, and the return in accordance therewith.

I do further certify that this transcript was prepared by me in my office and is being transmitted by direction of James J. Crossley, United States attorney, on behalf of the United States.

In witness whereof I have hereunto set my hand and the seal of said court this 30th day of December, 1913, at Fairbanks, Alaska.

[SEAL.]

ANGUS MCBRIDE,
Clerk District Court for the District of Alaska, Fourth Division.

(Indorsement on cover:) File No. 24041. Alaska District Court, 4th Division. Term No. 890. The United States, plaintiff in error, vs. John Wigger, alias "Moose John." Filed January 31st, 1914. File No. 24041.

JUN 8 1915
JAMES D. MAHER
CLERK

No. 349

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN WOODS, ALIAS "BOOZE JOHN."

IN ERROR TO THE DISTRICT COURT OF THE TERRITORY OF ALASKA, DIVISION NO. 1.

BRIEF OF THE UNITED STATES IN ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JOHN WIGGER, ALIAS "MOOSE JOHN."
No. 890.

IN ERROR TO THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NO. 4.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and, in accordance with the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, moves the court to advance this cause for hearing on a day convenient to the court during the next term.

The indictment contains three counts charging the defendant with three separate violations of the criminal laws in force in Alaska. The indictment was drawn in accordance with the provisions of the act of the Legislature of Alaska approved April 26, 1913, c. 39, Session Laws, 1913, amending section 43 of the act of Congress of March 3, 1899, 30 Stat. 1253, 1290.

46260—14

The defendant demurred on the grounds, among others, that more than one crime was charged in the indictment and that it contained a misjoinder of counts.

The lower court sustained the demurrer, holding the act of the legislature invalid. The decision of this question will determine whether in the District Courts of Alaska several offenses may be joined in one indictment in separate counts as provided for in said act.

Notice of this motion has been served upon opposing counsel.

JOHN W. DAVIS,
Solicitor General.

JUNE, 1914.

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V. The words "laws establishing * * * the judicial department" in the organic act of 1912 naturally refer to the institution of the courts and their jurisdiction. They are not apt words to define laws regulating practice, procedure, and pleadings, and were not so intended. The word "establish" is specifically used in each of those sections of the various Alaska statutes which provide the courts for the Territory 25–27

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VI. The insertion of the clause in question was made necessary simply because of the fact that the executive and judicial departments were already established when the act of 1912, providing for a legislature, was enacted. In order to prevent the legislature from altering the prior departments it was necessary to insert in the act something more than the usual clause forbidding the legislature from passing laws not "consistent * * * with the provisions of this act" 27–28

VII. No inconvenience or detriment to the interests of Alaska or of the United States can be brought about by giving to the act the construction urged by the Government and by sustaining the territorial legislation 29–32

VIII. It has been argued that because the organic act of 1912 omitted any provision as to judicial enforcement of the laws which the legislature therein provided for might enact, the courts had no power to enforce such laws, but were confined to enforcement of laws passed by Congress 32–34

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JOHN WIGGER, ALIAS "MOOSE JOHN." } No. 349.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, FOURTH DIVISION.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the District Court of the United States for the District of Alaska, Fourth Division, brought under the criminal appeals act of March 2, 1907 (34 Stat. 1246), to review a decision on demurrer as to the validity of the act of April 26, 1913, chapter 39 of the Sessions Laws of the Legislature of the Territory of Alaska.

The indictment in this case contains three counts charging the defendant with three separate violations of the criminal laws in force in Alaska. The indictment was drawn in accordance with the provisions of the act of the Legislature of Alaska, ap-

proved April 26, 1913, chapter 39, Session Laws, 1913, which provided as follows:

> That section 43 of Title II of the act of Congress approved March 3, 1899, entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District," be, and is hereby, amended to read as follows:
>
> " When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

Said section 43 of Title II of the act of Congress of March 3, 1899 (30 Stat., 1253, 1290), provided as follows:

> That the indictment must charge but one crime, and in one form only; except that where the crime may be committed by use of different means the indictment may allege the means in the alternative. (Sec. 2152, Compiled Laws of Alaska.)

By the same act (sec. 90 of Title II) it is provided that the defendant may demur to the indictment when it appears upon the face thereof—

> that more than one crime is charged in the indictment. (Sec. 2199, Compiled Laws of Alaska.)

The defendant demurred on the grounds, among others, that more than one crime was charged in the indictment and that it contained a misjoinder of counts. (R., 4.)

The lower court sustained the demurrer, holding the act of the legislature of 1913 invalid. (R., 5–18.)

ASSIGNMENTS OF ERROR.

The assignments of error (R., 22) complain of the court's action—

1. In sustaining the demurrer to the indictment.

2. In holding that chapter 39, Session Laws of Alaska, 1913, entitled "An act to amend section 43 of Title II of the act of Congress of March 3, 1899, entitled 'An act to define and punish crimes in the District of Alaska, and to provide a code of criminal procedure for said District,' " approved April 26, 1913, and effective July 26, 1913, is invalid.

3. In holding the indictment void as contrary to the provisions of sections 3, 9, and 15 of the act of Congress approved August 24, 1912, providing a Territorial legislature for Alaska, and contrary to section 2152, Compiled Laws of Alaska, for the reason that said indictment contains three separate counts charging three criminal offenses.

4. In sustaining the demurrer on the ground that chapter 39, Session Laws of Alaska, 1913, is in contravention of section 3 of the act of Congress approved August 24, 1912, providing for a Territorial legislature for Alaska.

ARGUMENT.

QUESTIONS INVOLVED.

The gist of the lower court's decision is to be found in the following paragraph:

> It would seem that the laws concerning procedure in the courts in actions prosecuted in the name of the United States, and by its officers, are an essential and integral part of the laws establishing the executive and judicial departments, and if such is the case these laws can be amended or repealed only by act of Congress.

The precise questions presented, therefore, are:

1. Has the Territorial Legislature of Alaska the power to enact legislation changing the criminal procedure in the district courts of Alaska?

2. Are the district courts of Alaska possessed of authority to enforce laws passed by the Territorial legislature?

STATUTES AS TO COURTS AND COURT PROCEDURE IN ALASKA.

Courts were first established by the act of May 17, 1884, chapter 53, section 3 (23 Stat., 24), which provides that—

> There shall be, and hereby is, established a district court for said District, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law.

And section 7, which provides:

> But the said district court shall have exclusive jurisdiction in all cases in equity or those involving a question of title to land, or mining rights, or the constitutionality of a law, and in all criminal offenses which are capital.

By section 4 of the Title I of the act of June 6, 1900, chapter 786 (31 Stat., 321), it was provided:

> There is hereby established a district court for the District, which shall be a court of general jurisdiction in civil, criminal, equity, and admiralty causes; and three district judges shall be appointed for the District * * *.
>
> The court shall consist of three divisions.

Under Title I, section 8, three district attorneys were to be appointed to—

> Perform the duties required to be performed by United States district attorneys in other districts and such other duties as may be required by law.

Title II of the same act, under section 698 (p. 442), provided that—

> The judicial power in the District of Alaska is vested in a district court, in commissioners exercising the powers of probate courts, and in commissioners as ex officio justices of the peace.
>
> The district court is a court of general jurisdiction, civil and criminal, and also shall have admiralty jurisdiction.

By section 713 the judge of the district court was vested with three certain powers, and

> Fourth. To exercise any other power and perform any other duty conferred or imposed upon him by this code or other statutes.

By section 2 of act of March 31, 1909, chapter 269 (35 Stat., 838), it was provided:

> There is hereby established a district court for the District of Alaska, with the jurisdiction of circuit and district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes.

And provision was made for four divisions of the court, four judges, four district attorneys, etc., instead of three.

The provisions of the above acts of 1900 and 1909 are substantially reproduced in the Compiled Laws of Alaska (1912).

The laws governing court procedure are as follows:

The act of May 17, 1884, chapter 53, section 7 (23 Stat., 24), provided that—

> The general laws of the State of Oregon now in force are hereby declared to be the law in said District so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.

And in section 9:

> The laws of the United States not locally inapplicable to said district and not inconsistent with the provisions of this act are hereby extended thereto.

A Penal Code and a Code of Criminal Procedure were established by the act of March 3, 1899, chapter 429 (30 Stat., 1253), entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district." It was provided in the enacting clause:

> That the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows: * * *

Title I, chapter 1, section 2 (p. 1253), provides:

> That the crimes and offenses defined in this act committed within the District of Alaska shall be punished as herein provided.

A Civil Code of Procedure was established by the act of June 6, 1900, chapter 786, title II (31 Stat., 321, 333), entitled "An act making further provisions for a civil government for Alaska, and for other purposes."

A Civil Code of Law was established by the act of June 6, 1900, chapter 786, Title III.

The above statutes are reproduced (with additions) in Titles XII, XIII, XIV, and XV of the Compiled Laws of Alaska (1912).

By the organic act of Alaska of August 24, 1912 (37 Stat., 512), it was provided:

> SEC. 3. That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: *Provided*, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States, or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the act entitled "An act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several acts amendatory thereof: *Provided further*, That this provision shall not operate to

> prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States.

And in section 4:

> That the legislative power and authority of said Territory shall be vested in a legislature which shall consist of a senate and a house of representatives. * * *

And in section 8:

> The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. * * *

I.

The act of April 26, 1913, of the Alaska Legislature has already been under consideration in this court, and no doubt was expressed as to its validity.

In the case of *Summers* v. *United States*, 231 U. S., 92, argued October 22, 23, 1913, and decided November 10, 1913, the question was involved whether section 43 of the Alaska Penal Code forbidding the joinder of crimes in an indictment applied to offenses against the Federal law as well as to offenses against the Alaska local Territorial law. The United States argued (first) that it did not so apply; and (second) that even if it did apply, said section had, since the trial in the lower

court, been amended by the Alaska Legislature by the enactment of the act of April 26, 1913, bringing the Alaska law as to joinder of crimes into exact conformity with the Federal law contained in Revised Statutes, section 1024. Hence, the United States argued that the appellate court should decide the matter "upon the law in force at the time of its decision, so that an error may become immaterial by reason of a change in the law, and when this happens the appellate court will not reverse, particularly when upon the new law the subsequent action of the lower court must be precisely the same as it was originally."

See Government's brief in *Summers* v. *United States,* pp. 15–25.

Ten pages of the Government's brief were devoted to argument of this proposition.

This Court devoted two pages of its opinion (pp. 105, 106) to a consideration of the Government's argument and decided against its validity. In doing so, however this Court necessarily assumed that the Alaska act of 1913 was a valid act; for if it was invalid, that fact in itself ended the argument, and it would have been unnecessary to consider further the reasons urged by the Government for giving the act retrospective operation.

While, therefore, the case of *United States* v. *Summers* is not conclusive on the question of the validity of the act, it may at least be said that it never entered the head of either this Court, the peti-

tioner, or the Government to claim the act to be invalid.

The remarks of Taney, C. J., in *Stairs* v. *Peaslee* (1855), 18 Howard, p. 530, are somewhat pertinent:

> We do not refer to this case as a judicial decision of the question before us; because, although it was in the case, the attention of the court was not called to it. But it certainly may fairly be inferred from it that in 1853, when this case was decided, no doubt had been suggested as to the construction of the act of 1846.

II.

The Territory of Alaska and its district court have the same status and substantially the same powers as other Territories and Territorial district courts of the United States.

The following propositions as to the status and powers of Territories in general and of Alaska in particular are clearly established by decisions of this Court.

(1) Alaska is an organized Territory of the United States.

> *Rassmussen* v. *United States* (1905), 197 U. S., 516, 523.
>
> *Interstate Commerce Commission* v. *Humboldt Steamship Co.* (1912), 224 U. S., 474, 482.

(2) With the exception that the laws must not be inconsistent with the organic act or the Constitu-

tion or laws of the United States, "the power of the Territorial legislature was apparently as plenary as that of the legislature of a State."

Cope v. *Cope* (1891), 137 U. S., 682, 684; *Maynard* v. *Hill* (1888), 125 U. S., 190; and *Guthrie National Bank* v. *Guthrie* (1899), 173 U. S., 528.

(3) Congress has plenary authority to legislate in regard to the Territories.

(*a*) Congress, in so legislating, acts in a double capacity, both as the Congress of the United States and as the legislature of the Territory.

The American Insurance Co. et al. v. *Canter* (1828), 1 Peters, 511, 516.

Nagle v. *United States* (1911), 191 Fed., 141, 145.

(*b*) The organic act of a Territory stands in the place of a constitution for it.

Carter v. *Gear* (1905), 197 U. S., 348, 353.

(4) The laws of the United States regulating procedure in Federal courts are locally inapplicable to the Territories.

Hornbuckle v. *Toombs* (1873), 18 Wall., 648, 654.

(5) (*a*) A law passed by Congress regulating procedure in the district courts of a Territory is not a general law of the United States, but a law of the Territory passed by Congress in its capacity as the supreme legislature of the Territory. Such law may be amended or repealed by a subsequent law of

a Territorial legislature, provided Congress shall not disapprove such law.

United States v. *Pridgeon* (1894), 153 U. S., 53, 54.

(*b*) The law passed by Congress in 1899 providing a Criminal Code of Procedure for Alaska applies not only to crimes local to Alaska and constituted by the Alaska Penal Code of 1899, enacted by Congress, but also to Federal crimes general throughout the United States constituted by the general Federal laws.

Summers v. *United States* (1913), 231 U. S., 92.

(6) A Territorial legislature has full power to pass laws regulating the procedure in district courts of the Territory (in the absence of any express restriction by Congress).

Clinton v. *Englebrecht* (1871), 13 Wall., 434, 445;

Beall v. *New Mexico* (1872), 16 Wall., 535;

Snow v. *United States* (1873), 18 Wall., 317, 321;

Hornbuckle v. *Toombs* (1873), 18 Wall., 648, 654, et seq;

Good v. *Martin* (1877), 95 U. S., 90, 98;

Reynolds v. *United States* (1878), 98 U. S., 145;

Thiede v. *Utah* (1895), 159 U. S., 510, 515;

Walker v. *New Mexico, etc., R. R.* (1897), 165 U. S., 593;

James v. *Appel* (1904), 192 U. S., 129, 137; and

Matter of Moran (1906), 203 U. S., 96.

A possible limitation to the above doctrine is suggested in *Hornbuckle* v. *Toombs, supra,* as to the power of a Territorial legislature to regulate procedure of Territorial district courts when sitting for the trial of exclusively Federal questions; but the recent case of *Summers* v. *United States, supra,* would, in its reasoning, seem to deny the distinction.

(7) A Territorial legislature may confer additional jurisdiction on district courts of the Territory if not inconsistent with the provisions of the organic act.

> *The American Insurance Company et al* v. *Canter* (1828), 1 Peters, 511, 544;
>
> *Ferris* v. *Higley* (1874), 20 Wall., 375, 380–384;
>
> *Ex parte Lothrop* (1885), 118 U. S., 113, 118; and
>
> *Clough* v. *Curtis* (1890), 137 U. S., 361, 368.

(8) (*a*) The district courts of a Territory are not courts of the United States within the meaning of the Constitution, but are "courts of the Territories invested for some purposes with the powers of the courts of the United States."

> *The American Insurance Co. et al.* v. *Canter* (1828), 1 Peters, 511, 516;
>
> *Clinton* v. *Englebrecht* (1871), 13 Wall., 434, 447;
>
> *Reynolds* v. *United States* (878), 98 U. S., 145, 154.

(*b*) The district courts of a Territory may act in a dual capacity both as Federal courts and as Territorial courts.

> *Ex parte Crow Dog* (1883), 109 U. S., 556, 560.
>
> The district court has two distinct jurisdictions. As a Territorial court it administers the local law of the Territorial government; as invested by act of Congress with jurisdiction to administer the laws of the United States, it has all the authority of circuit and district courts; so that, in the former character, it may try a prisoner for murder committed in the Territory proper, under the local law * * * and, in the other character, try another for a murder committed within the Indian reservation under a law of the United States * * *.
>
> *Gon-Shay-Ee, petitioner* (1889), 130 U. S., 343, 348.
>
> *United States* v. *Pridgeon* (1894), 153 U. S., 48, 52.

(*c*) The district court of Alaska is not a court of the United States, although invested with the powers of a district court of the United States.

> *McAllister* v. *United States* (1891), 141 U. S., 174, 189.

(*d*) It is "in every substantial sense the supreme court of that Territory."

> *Steamer Coquitlam* v. *United States* (1896), 163 U. S., 346.

(*e*) It is vested with general jurisdiction to enforce the local laws of Alaska enacted by Congress acting as the Territorial legislature.

> It is manifest, therefore, that the district court for the District of Alaska has now jurisdiction of the violation of all local laws of the District of Alaska, as well as the violations of all national laws applicable to the District of Alaska.
>
> Lyon, D. J., in *United States* v. *The North Pacific Wharves & Trading Co.*, April 21, 1912.
>
> See opinion cited in full in the Government's brief in *Summers* v. *United States, supra.*

III.

The clause in the Alaska organic act of 1912 restricting the legislature from amending "all laws of the United States heretofore passed establishing the executive and judicial departments" did not abrogate the power of the legislature to amend the criminal procedure or criminal law of Alaska as contained in the act of 1899 enacted by Congress when Alaska possessed no legislature.

(1) Congress, in enacting a criminal code for a Territory, intends it as a—

> Territorial code as distinguished from the laws of the United States in force in the Territory * * * and that they should sustain the same relation to this court and to the people of the Territory and to the legislative assembly as a code of laws enacted by the legislative assembly.
>
> *Ex parte Larkin*, 1 Oklahoma, 53, 57.

This view of an act of Congress extending to the new Territory of Oklahoma the criminal code of Nebraska has been adopted by this Court:

> But we are of the opinion that the supreme court of the Territory in *ex parte Larkin* has taken the proper view * * * in holding that the laws of Nebraska were adopted as a Territorial code.
>
> *United States* v. *Pridgeon* (1894), 153 U. S., 48, 54.

The act of Congress of 1899 establishing a penal code for Alaska was, therefore, a statute passed by Congress substantially acting as the Territorial legislature. It was a Territorial code, in enforcing which the courts were not enforcing a Federal law of the United States as to Federal crimes. It was, therefore, subject to amendment by any Territorial legislature that might later be constituted (unless such legislature should be expressly prohibited by Congress from amending it).

(2) Power in a Territorial legislature to regulate practice, pleadings, and procedure in its courts has been sustained uniformly by this court.

> See cases, *supra*, II, 6.

(3) There is every reason to believe that Congress intended to give to the Alaska Legislature the same scope in this respect that it had given to every other Territory.

Thus, the Alaska act provides in the seventh line of section 3 of the organic act of 1912—

> That except as herein provided all laws now in force in Alaska shall continue in

> force and effect until altered, amended, or repealed by Congress *or by the legislature.*

This clause gave effect to the laws already in force in Alaska, until altered or repealed by the Alaska Legislature; and would naturally include the Code of Procedure then existing, viz: the Code of 1899.

In exactly the same way, the organic acts of the other Territories gave effect to the laws then in force in each Territory, and extended them to cover the new Territory, until altered or repealed *by its legislature.*

Thus, in the Territory of Orleans and District of Louisiana it was provided (1804), 2 Stat., 284, that:

> The laws in force in the said Territory at the commencement of this act and not inconsistent with the provisions thereof shall continue in force until altered, modified, or repealed by the legislature.
>
> * * * * *
>
> The laws in force in the said District of Louisiana at the commencement of this act and not inconsistent with any of the provisions thereof shall continue in force until altered, modified, or repealed by the governor and judges of the Indiana Territory as aforesaid.

In the Territory of Missouri (1812), by section 16 of 2 Stat., 743, the laws of the Territory of Louisiana were declared to be in force until altered or repealed by the Territorial legislature.

In the Territory of Alabama (1817), by section 29 of 3 Stat., 371, the laws of Mississippi were similarly applied.

In the Territory of Arkansas (1819), by section 10 of 3 Stat., 493, the laws of Missouri were similarly applied.

In the Territory of Florida (1822), by section 13 of 3 Stat., 654—

> The laws in force in said Territory at the commencement of this act and not inconsistent with the provisions thereof, shall continue in force until altered, modified, or repealed by the legislature.

In the Territory of Wisconsin (1836), by section 12 of 5 Stat., 107, the laws of Michigan were similarly applied.

In the Territory of Iowa (1838), by section 12 of 5 Stat., 235, the laws of Wisconsin were similarly applied.

In the Territory of Oregon (1848), by section 14 of 9 Stat., 323—

> The existing laws now in force in the Territory of Oregon, under the authority of the provisional government established by the people thereof, shall continue to be valid and operative * * *, subject, nevertheless, to be altered, modified, or repealed by the legislative assembly of the said Territory of Oregon.

In the Territory of Minnesota (1849), by section 12 of 9 Stat., 403, the laws of Wisconsin were similarly applied.

In the Territory of Washington (1853), by section 15 of 10 Stat., 172, it was provided that the criminal laws of Oregon be applied:

> All crimes and misdemeanors against the laws now in force within the limits of the Territory of Washington may be prosecuted, tried, and punished in the courts established by this act.

In the Territory of Wyoming (1868), by section 17 of 15 Stat., 178, all general Territorial laws of Dakota in force in any portion of Wyoming were "to continue in force until repealed by legislative authority of said Territory, except," etc.

In the Territory of Oklahoma (1890), by section 11 of 26 Stat., 81—

> The provision of the Code of Procedure and of the Criminal Code of Nebraska were extended to Oklahoma "until after adjournment of the first session of the legislature."

In the Indian Territory (1890), by section 30 of 26 Stat., 93, the criminal law and criminal procedure of Arkansas were specially extended.

To test the validity of the district court's argument that the Code of Criminal Procedure provided for by the Alaska act of 1899 (30 Stat., 1253) was an integral part of the "establishment of the judicial department," let us suppose that the act of 1899 had not been passed, but that at the time of the organic act of 1912 the laws of Oregon as to procedure were still in force in Alaska (as originally extended to Alaska in the act of 1884), could it now

be claimed that the Legislature of Alaska has no power to modify or repeal such laws in their application to Alaska?

Such claim would be directly in the face of the law as laid down by this court in *United States* v. *Pridgeon*, *supra*.

(4) Power in the Territorial legislatures to pass laws relating to procedure of courts, etc., is not derived wholly, however, from the power given to it to alter or repeal laws in force in the Territory at the time of the passage of the organic act. For the organic acts of certain Territories (viz, Utah, New Mexico, Nebraska, Kansas, Colorado, Nevada, Dakota, Arizona, Idaho, and Montana [1]) contained no clause extending to them laws already in force in the Territories, respectively. Hence, the power which this court decided that they possessed (see cases, *supra*, relating to Utah and Montana, etc., legislation) to legislate on court procedure must be derived entirely from the general clause found in the organic acts of those Territories to legislate on "all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act." (See *supra*.)

If, however, on the theory announced by the district court in this case (Rec., p. 16), the provisions of the organic act establishing courts comprised the regulation of court procedure as an integral part thereof, then any law passed by the Territorial leg-

[1] See Appendix.

islature in the above Territories would have been inconsistent with the organic act, and hence void. Yet this court has held to the contrary.

IV.

While admitting that remarks made by Members of Congress in the course of debates upon a pending bill do not "furnish a firm ground for its proper construction" (Maxwell v. Dow (1900), 176 U. S., 601), the history of this Alaska act of 1912 may fairly be considered with reference to the intent of the provisions of section 3 in question.

The act was originally introduced by Mr. Wickersham, the Delegate from Alaska (formerly judge of the district court of Alaska, third division, 1900–1907), on June 7, 1909, in the Sixty-first Congress, first session. It was reported April 23, 1912, in the Sixty-second Congress, second session, as House Document No. 38. (See Congressional Record, 62d Cong., 2d sess., p. 5242.) As reported, section 3 contained the clause in question:

> That all laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by act of Congress.

Together with the following clause, which appeared in the act as passed:

> That, except as herein provided, all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or *by the legislature.*

Then followed a proviso restricting the power to the legislature to repeal certain named laws of the United States (none of which was concerned with the criminal or civil law codes or procedure).

Representative Flood, who reported the bill, stated that it was a bill " for local self-government; one which permits the people of Alaska to elect a legislature of her own to enact her local law." (Cong. Rec., ibid., p. 4935.)

There was no debate upon the clause as to " laws establishing the executive and judicial departments " and no reference made to it in debates. But the further clause giving the legislature power to repeal laws now in force in Alaska was explained in debate by Delegate Wickersham in reply to questions whether the clause gave power to amend or repeal the laws as to fishery and seals.

He stated that the very purpose of the clause was to authorize the Alaska Legislature to amend the penal and civil codes enacted by Congress; in other words, that its express purpose was to give to the legislature precisely the authority which the Government in this case claims the legislature possesses:

> Mr. WICKERSHAM. I do not think a Territorial legislature could be given power to control Congress or repeal its legislation.
>
> Mr. MANN. Not without authority; but the express authority is given in this bill to repeal an act of Congress.
>
> Mr. WICKERSHAM. Congress passed a criminal code for Alaska in 1899 and a civil

code in 1900, a class of legislation never before given to a Territory by Congress, and it is necessary for the Alaska Legislature to have authority to change, correct, or amend those codes. It is an unusual situation. (Cong. Rec., ibid., p. 5279.)

Mr. BUTLER. But I would like to ask the gentlemen whether or not in the third section of this bill there is not authority conferred upon the legislature to repeal the acts of Congress that we passed?

Mr. WICKERSHAM. It is necessary to give the legislature authority to alter, amend, or repeal some of the laws passed by Congress, such as our civil and criminal codes, but there is a special exception in section 3 that this power shall not extend to the customs, internal revenue, or other general laws of the United States.

Mr. BUTLER. I appreciate that. At the same time, I understood the gentleman to say in answer to the gentleman from Illinois that there was no authority conferred upon this legislature to repeal existing acts of Congress applicable to Alaska.

Mr. WICKERSHAM. I think the legislature does have some proper authority in that respect, and it is necessary. If you created a legislature in Alaska and did not give it that power, it could do nothing after it was created, because the criminal and civil codes now in force in Alaska, not including, of course, the United States penal laws, are laws passed by Congress. I think the matter is safely limited by section 3.

(Cong. Record, ibid., p. 5283.)

V.

The words "laws establishing * * * the judicial department" in the organic act of 1912 naturally refer to the institution of the courts and their jurisdiction. They are not apt words to define laws regulating practice, procedure, and pleadings, and were not so intended. The word "establish" is specifically used in each of those sections of the various Alaska statutes which provide the courts for the Territory.

The district court (Rec., p. 16) holds:

> It would seem that the laws concerning procedure in the court in actions prosecuted in the name of the United States and by its officers are an essential and integral part of the laws establishing the executive and judicial departments.

This seems to be a strained definition of the word "establish" as used in section 3 of the organic act of Alaska of 1912:

> That all laws of the United States heretofore passed *establishing the executive and judicial departments* in Alaska shall continue in full force and effect until amended or repealed by act of Congress.
>
> "Establish"—to "found, ordain, institute."—(Standard Dictionary, 1911.)
>
> Something was said in argument about the use of the word "prescribe" in the organic act of Arizona and "establish" in that of Florida, but we attach no importance to this. The words are often used to express the same thing, and Webster classes them as synonyms.
>
> *Ex parte Lothrop* (1885), 118 U. S., 113, 119.

The judicial *department* of a government means that branch which exercises the judicial power, i e., the courts, their judges and officers.

The establishing of a judicial department means the founding or instituting of courts with their judges and officers and jurisdictions.

The regulation of pleadings and court procedure does not aptly come within the phrase "establishing a judicial department."

The original Alaska act of 1884 (23 Stat., 24) shows by its own terms what is meant by the phrase in the act of 1912 "laws establishing a judicial department," for such act of 1884 uses the precise word "establish":

> There shall be, and hereby is, *established* a district court for said District with the civil and criminal jurisdiction of district courts of the United States and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit court and such other jurisdiction not inconsistent with the act as may be *established* by law.

So in the Alaska act of 1900 (31 Stat., 321):

> There is hereby *established* a district court for the District which shall be a court of general jurisdiction in civil and criminal, equity, and admiralty causes.

So in the Alaska act of 1909 (35 Stat., 839):

> There is hereby *established* a district court for the District of Alaska with the jurisdiction of circuit and district courts of the

> United States and with a general jurisdiction in civil, criminal, equity, and admiralty cases.

It may be noticed incidentally that the original Federal judiciary act of September 24, 1789, chapter 20 (1 Stat., 23), providing for Federal courts and their jurisdiction and power, was entitled:

> An act to *establish* the judicial courts of the United States,

whereas a separate statute was passed to provide for procedure, pleading, etc., in such courts—the Federal process act of September 29, 1789, chapter 21 (1 Stat., 93), entitled:

> An act to regulate processes in the courts of the United States.

VI.

The insertion of the clause in question was made necessary simply because of the fact that the executive and judicial departments were already established when the act of 1912 providing for a legislature was enacted. In order to prevent the legislature from altering the prior departments, it was necessary to insert in the act something more than the usual clause forbidding the legislature from passing laws not "consistent * * * with the provisions of this act."

In the organic act of practically every Territory, other than Alaska, a provision was made for the vesting of the executive power, the judicial power, and the legislative power. Substantially all the organic acts (since 1849) had contained clauses that the legislature should not pass any laws not "con-

sistent with the Constitution of the United States and the provisions of this act." (Minnesota, New Mexico, Utah, Nebraska, Kansas, Colorado, Nevada, Dakota, Idaho, Montana, Wyoming.[1])

It was, of course, unnecessary therefore to insert in these acts any specific clause preventing the legislature from amending or repealing the law establishing the executive or judicial departments, they being established by the organic act itself; for an act of the Territorial legislature so amending or repealing would have been not "consistent * * * with the provisions of this act."

In the Alaska organic act, on the other hand, it became necessary to insert something more than the usual and ordinary clause forbidding the legislature to pass acts not "consistent * * * with the provisions of this act"; for, as the act only provided for the vesting of the legislative power, a statute passed by the Territorial legislature amending the executive or judicial departments (created by prior acts) would not have been inconsistent "with the provisions of this act."

The meaning of the clause is simply that the legislative assembly created by that act shall have no power to create either a judicial or an executive department other than those existing; in other words, that Congress considered the Territory possessed of an ample organization, excepting only as to the legislative department thereof.

[1] See Appendix.

VII.

No inconvenience or detriment to the interests of Alaska or of the United States can be brought about by giving to the act the construction urged by the Government and by sustaining the Territorial legislation.

For, as was said in *Reynolds* v. *United States* (1878), 98 U. S., 145, 154:

> As Congress may at any time assume control of the matter, there is but little danger to be anticipated from improvident Territorial legislation in this particular.

And in *Hornbuckle* v. *Toombs* (1873), 18 Wall., 648, 655:

> Of course, in case of any difficulty arising out of this state of things, Congress has it in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper.

The court below urges as a reason why the undoubted power of other Territories to legislate as to court procedure should not be deemed granted to Alaska the fact that the procedure now prevailing in Alaska differs from that prevailing in the other Territories.

The court says:

> In contrast with the procedure in the different Territories under the laws above referred to, the condition under the criminal laws of Alaska show several differences. In the other Territories the offenses charged in

the indictment in this case would be offenses against the Territorial laws and not against the laws of the United States. The prosecution would be conducted by a Territorial attorney general or district attorney; the expenses of the court while trying cases of such nature would be borne by the Territory; if the defendant were convicted, and a sentence of imprisonment imposed, the expenses of such imprisonment would be borne by the Territory, while if a fine were imposed, it would be collected for the benefit of the Territory or of a county therein.

In Alaska all crimes are prosecuted in the name of the United States by the attorney of the United States, and fees and expenses of witnesses and jurors are paid by the United States from appropriations made by act of Congress; and in case of the conviction of an offender, any moneys collected are for the benefit of the United States, and all expenses of imprisonment are borne by the United States in Federal jails within the Territory or in penitentiaries of the United States without the Territory.

In view of these different conditions, it may well be doubted whether Congress intended to confer upon the Legislature of the Territory of Alaska such control of proceedings in criminal cases as had been invested in the legislature of other Territories wherein prosecutions were conducted by Territorial officers and the expenses of criminal proceedings were borne by the Territories themselves.

But it may be pointed out that, as a matter of fact, the procedure in Alaska conforms more closely to what this Court has stated to be the proper practice than does that of the other Territories.

See *Snow* v. *United States* (1873), 18 Wall., 317, 321:

> It must be confessed that this practice exhibits somewhat of an anomaly. Strictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself. Crimes committed therein are committed against the Government and dignity of the United States. It would seem that indictments and writs should regularly be in the name of the United States, and that the attorney of the United States was the proper officer to prosecute all offenses. But the practice has been otherwise, not only in Utah, but in other Territories organized upon the same type.

The fact that the United States bears the expenses of all criminal trials in Alaska is not in itself sufficient to warrant the assumption that, on that account alone, the legislature is debarred from legislating on court procedure: for if the Alaska Legislature were prohibited from legislating on any topics regarding which the United States Government bore the expense, its scope of legislation would be extremely narrow.

It is true that the Alaska Legislature by section 15 of the organic act is forbidden to expend money

out of Government appropriations for objects not authorized by the Government appropriations at or beyond the amount of the appropriations (as urged by the district court, Rec., p. 15). It is difficult to see, however, how this prohibition can affect its power to pass laws on court procedure or pleadings in general which do not involve any such infraction of said section 15; especially in a case where, as stated by the district court (Rec., p. 15):

> While it is not apparent that the expenses of administering the criminal laws could be in any way increased by the act of the Territorial legislature, but on the contrary would probably be diminished.

VIII.

It has been argued that because the organic act of 1912 omitted any provision as to judicial enforcement of the laws which the legislature therein provided for might enact, the courts had no power to enforce such laws, but were confined to enforcement of laws passed by Congress.

It seems to be too clear for argument that under the broad grant of jurisdiction contained in the acts of 1900 and 1909, the courts of Alaska are vested with judicial power to enforce the common law, Federal law, and Territorial law.

If there were any doubt on this matter, it would be removed by the enactment by Congress of a declaratory statute (Public, No. 192, Sixty-third Congress, approved August 29, 1914, entitled "An act to amend an act entitled 'An act creating a legis-

lative assembly in the Territory of Alaska and conferring legislative power thereon, and for other purposes,'" approved August 24, 1912):

> That nothing in that act of Congress entitled "An act creating a legislative assembly in the Territory of Alaska and conferring legislative power thereon, and for other purposes," approved August twenty-fourth, nineteen hundred and twelve, shall be so construed as to prevent the courts now existing or that may be hereafter created in said Territory from enforcing within their respective jurisdictions all laws passed by the legislature within the power conferred upon it the same as if such laws were passed by Congress, nor to prevent the legislature passing laws imposing additional duties, not inconsistent with the present duties of their respective offices, upon the governor, marshals, deputy marshals, clerks of the district courts, and United States commissioners acting as justices of the peace, judges of probate courts, recorders, and coroners, and providing the necessary expenses of performing such duties; and in the prosecuting of all crimes denounced by Territorial laws the costs shall be paid the same as is now or may hereafter be provided by act of Congress providing for the prosecution of criminal offenses in said Territory, except that in prosecutions growing out of any revenue law passed by the legislature the costs shall be paid as in civil actions, and such prosecutions shall be in the name of the Territory.

CONCLUSION.

It is respectfully submitted that the demurrer should have been overruled; that the act of April 26, 1913, chapter 39 of Alaska should have been held valid; and that the judgment of the district court should be reversed.

CHARLES WARREN,
Assistant Attorney General.

OCTOBER, 1914.

APPENDIX.

LIST OF TERRITORIAL ORGANIC ACTS.

N. W. Territory, 1787 (1 Stat., 51, Note E).

Territory south of the Ohio in 1790 (1 Stat., 123).

Mississippi, 1798 (1 Stat., 579).

Indiana, 1800 (2 Stat., 58; Gov. like N. W. Territory).

Louisiana, 1804 (2 Stat., 287).

Orleans, 1804 (2 Stat., 284).

Michigan, 1808 (2 Stat., 309; Gov. like N. W. Territory).

Illinois, 1809 (2 Stat., 514).

Missouri, 1812 (2 Stat., 743).

Alabama, 1817 (3 Stat., 371).

Arkansas, 1819 (3 Stat., 493).

Florida, 1822 (3 Stat., 654); 1823 (3 Stat., 756).

Wisconsin, 1836 (5 Stat., 10).

Iowa, 1838 (5 Stat., 235).

Oregon, 1848 (9 Stat., 323).

Minnesota, 1849 (9 Stat., 403).

New Mexico, 1850 (9 Stat., 446).

Utah, 1850 (9 Stat., 453).

Washington, 1853 (10 Stat., 172).

Nebraska, 1854 (10 Stat., 277).

Kansas, 1854 (10 Stat., 277).

Colorado, 1861 (12 Stat., 172).

Nevada, 1861 (12 Stat., 209).

Dakota, 1861 (12 Stat., 239).

Arizona, 1863 (12 Stat., 664).

Idaho, 1863 (12 Stat., 808).
Montana, 1864 (13 Stat., 85).
Wyoming, 1868 (15 Stat., 178).
Alaska, 1884 (23 Stat., 24).
Oklahoma, 1890 (26 Stat., 81).
Indian Territory (26 Stat., 93).

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